86-683



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL ZEMONICK, et al.,

Petitioners,

VS.

CONSOLIDATION COAL CO.
and
DISTRICT 31, UNITED MINE WORKERS
OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the three-factor test from Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for determining when a decision should be applied retroactively requires an equitable balancing of all three factors and consideration of the parties' reasonable reliance on prior law.

2. Whether the decision in DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), imposing the N.L.R.A.'s six month statute of limitations on § 301/duty of fair representation suits, should be retroactively applied to dismiss a claim that: (1) was filed fourteen months after the cause of action arose in a jurisdiction where clear

authority had established a five year limitation and where the shortest possible state limitations period was two years; and (2) had been fully litigated, with cross motions for summary judgment pending, when DelCostello changed the law and prompted defendants to amend their answer and move to dismiss on statute of limitations grounds.

3. Whether the six month statute of limitation in § 10(b) of the National Labor Relations Act applies to a claim for relief seeking to vacate an arbitration decision because it violates law and public policy.

## LIST OF PARTIES

The following individuals, petitioners in this Court, were appellants in the Fourth Circuit and plaintiffs in the district court:

Michael Zemonick
Andrew Ulrich (now deceased)
Cecil Main
Edward Prickett
Donald Cyphers
Robert Allen
Gary Jarrett
Ronald Moorehead
Raymond Walton
Donald Waters
Joseph Amalett

The appellees in the Fourth Circuit and defendants in the district court (now respondents) were:

Consolidation Coal Company, Inc.
District 31, United Mine Workers of America

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## DECISIONS BELOW

The en banc decision by the Court of Appeals for the Fourth Circuit appears at 796 F.2d 1546 (1986) and in Appendix A, below. It set aside an earlier panel decision of the Circuit, which appears at 762 F.2d 381 (1985) and in Appendix B, below. The en banc court adopted the rationale of the panel's dissenting opinion. 762 F.2d at 389-97. The district court's opinion was not published, but appears in Appendix C.

## JURISDICTIONAL GROUNDS

A. The Court of appeals for the Fourth Circuit entered its judgment in this proceeding on July 28, 1986.

B. This Court has jurisdiction to review the judgment of the Fourth Circuit under 28 U.S.C. § 1254(1).

## RELEVANT STATUTES

National Labor Relations Act § 10(b), 29 U.S.C. § 160(b).

> . . . [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, . . . .

Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry

affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

West Virginia Code 55-2-6
Actions to Recover on Award or Contract Other than Judgment or Recognize

Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: If the case be upon an indemnifying bond taken under any statute, or

upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer, within ten years; if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; if it be upon any other contract, express or implied, within five years, unless it be an action by one party against his copartner for a settlement of the partnership accounts, or upon accounts concerning the trade or merchandise between merchant and merchant, their factors or servants, where

the action of account would lie, in either of which cases the action may be brought until the expiration of five years from a cessation of the dealing in which they are interested together, but not after.

## STATEMENT OF THE CASE

This is a civil action seeking reinstatement, backpay, emotional distress damages, and punitive damages for the 1980 terminations of petitioners from their jobs as coal miners at the Consoldiation Coal Company's Four States Mine in Marion County, West Virginia.

The controversy arose after a February, 1980, strike occurred at the Four States Mine and the company (hereafter referred to as "Consol") discharged peti-

tioner Zemonick on the theory he was the ringleader. The miners returned to work but walked out again after learning of Zemonick's discharge. The strike soon spread to other Consol mines in the area. Consol then discharged the other ten petitioners, claiming they instigated those work stoppages. Each of the discharges went to arbitration and by April 18, 1980, each was upheld.

The miners immediately filed claims with the National Labor Relations Board and directed an attorney to prepare a civil action against Consol. The NLRB claims proved unsuccessful and the attorney too slow. So the miners hired a second attorney, who also failed to make

adequate progress toward litigation. Thus, in March, 1981, the miners engaged their third (and present) lawyer, who then intiated the present litigation in state court in June, 1981. That filing was almost four years in advance of the running of the then controlling statute of limitations, as imposed by authoritative Fourth Circuit precedent. Consol removed the case to federal district court, which assumed jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 185.

The complaint alleged that Consol, in making the decisions to discharge, and the arbitrators, in affirming the discharges, applied a standard that violated law and public policy because it strangled miners' rights under the National Labor Relations

Act and the federal and state constitutions. In addition, plaintiffs charged their union, District 31 of the United Mine Workers, failed to fairly represent them in the grievance process and their dismissals violated the collective bargaining agreement. Finally, the complaint added several state tort claims.

Extensive discovery ensued. Plaintiffs deposed several witnesses, the parties exchanged several sets of interrogatories, and thousands of pages of documents were produced and reviewed. In 1983, the plaintiffs and Consol filed cross motions for summary judgment on the merits of the law and public policy claims. Both sides submitted comprehen-

sive memoranda of law.

While the cross motions for summary judgment were pending, this Court decided DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), which held the applicable statute of limitations for hybrid § 301/duty of fair representation (DFR) claims is the six month period stated in § 10(b) of the National Labor Relations Act. Consol then moved to amend its answer and add, for the first time, a statute of limitations defense. After that motion was granted, Consol moved for partial summary judgment as to the plaintiffs' DFR/§ 301 claims. The district court, however, dismissed as untimely both the DFR/§ 301 and the law and public policy causes of action. The court then dis-

missed the state law claims for lack of jurisdiction.

Plaintiffs appealed the decision to the Fourth Circuit. A three-judge panel reversed, holding that DelCostello could not be retroactively applied to this case. The circuit court, however, reheard argument en banc and voted, 7-3, to affirm.

## ARGUMENT

### I. THE CIRCUITS ARE IN SHARP CONFLICT ON THE RETROACTIVITY OF DELCOSTELLO AND ON APPLICATION OF THE CHEVRON RETROACTIVITY ANAYLSIS.

The lower courts are in considerable disarray over important and recurrent questions governing the test, set down by this Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for determining retroactive application of a decision announcing a new rule of law. The confusion is particularly visible when the new rule provides for a limitations period different from that which had previously prevailed. The lower courts have thus split over the retroactivity of this Court's decision in DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983),

which held the six month statute of limitations in § 10(b) of the National Labor Relations Act governs "hybrid" actions brought under § 301 of the Labor Management Relations Act claiming violations of a union's duty of fair representation and an employer's duties under the collective bargining agreement.

Chevron outlined three factors for determining whether a decision should be applied retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and

> effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.

404 U.S. at 106 (citations omitted).

Application of those factors has resulted in splits among the circuits over several issues.

First, the lower courts have disagreed over the meaning of the first factor. Several circuits have held it must be assessed in terms of whether there was any nationwide dispute about the legal principle in question, while other courts have focused on whether there was clear past precedent within that particular

circuit. Compare, e.g., Zemonick v. Consolidation Coal Co., 762 F.2d 381, 392 (dissenting opinion), adopted by the en banc court, 796 F.2d 1546 (4th Cir. 1986); Perez v. Dana Corp., 718 F.2d 581 (3rd Cir. 1983) (national survey conducted), with Anton v. Lehpamer, 787 F.2d 1141, 1143 (7th Cir. 1986); Smith v. City of Pittsburgh, 764 F.2d 188, 195 (3rd Cir. 1985); Abbitt v. Franklin, 731 F.2d 661 (10th Cir. 1984) (clear precedent in the circuit controlss). The latter courts have relied on the observation in Chevron that the decision whose retroactivity was there in dispute had "effectively overruled a long line of decisions in the Fifth Circuit." 404 U.S. at 107.

The circuits have also disagreed about the degree of clarity intended by Chevron's "clear past precedent" standard. The Third Circuit recently stated the proper inquiry in a statute of limitations case to be whether "prior law [was] sufficiently clear that the plaintiff could have reasonably relied upon it in delaying suit." Al-Khazraji v. St. Francis College, 784 F.2d 505, ___, 40 FEP 397, 402 (3rd Cir. 1986), cert. granted, ___ U.S. ___, 55 U.S.L.W. 3231 (1986). The Tenth Circuit used a similar approach, pointing to justifiable reliance by a plaintiff on a pre-existing statute of limitations to conclude DelCostello overruled clear past precedent. Jones v. Consolidated Freightways Corp., 776 F.2d 1458, 1462 (10th Cir.

1985). For that court, "the mention of a new federal standard does not demonstrate the existence of a majority in its favor" or establish a sufficient basis to put a plaintiff on notice he should hasten to the courthouse. Id. In marked contrast, the Fourth Circuit in adopting Judge Ervin's opinion found that the "mention" of a new standard in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), precluded the existence of any clear past precedent. Zemonick, 762 F.2d at 392.

Second, conflict has developed over application of the second Chevron factor, that regarding the underlying purposes of the decision whose retroacvtivity is in question. Judge Ervin's opinion below,

for example, insisted that factor "cannot vary -- it either favors retroactive application of DelCostello in every case or not at all." Zemonick, 762 F.2d at 394 n.10. In contrast, other circuits have concluded that different facts can have different effects upon the precedent's identified purposes. For example, the Ninth Circuit has noted differing effects between retroactive applications that would shorten the limitations period and those that would extend the period. See Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1984). In addition, Part II, infra, explains how a finding of non-retroactivity in this case would have a decidedly different impact on DelCostello's purposes from that which would

result in most other cases.

Third, the circuit court decisions reflect widely varied treatment of Chevron's third factor, which requires consideration of equities that might result from retroactive application. For example, the Tenth Circuit has found substantial equity in the justified reliance of a plaintiff on a previously prevailing limitations period. Jones, 776 F.2d at 1463. That alone was enough to swing the third Chevron factor to the plaintiff's side, even though plaintiff had taken twenty months to file his claim and had not expended substantial resources in litigation. In contrast, Judge Ervin in Zemonick refused to find any equities in the plaintiff's

reliance, charged that thirteen months to file a claim were unreasonably long, ignored the fact the parties had cross-moved for summary judgment on the merits, and dismissed the expenditure of resources argument with the comment, "nearly every plaintiff will have 'expended considerable time and money' during the trial preparation stage."

Fourth, the cases reveal considerable confusion about the relationship between the three Chevron factors. Some courts have held that "all three hurdles of the Chevron test must be passed before courts will refuse to give a case retroactive effect." Zemonick, 762 F.2d at 391; Rogers v. Lockheed-Georgia Co., 720 F.2d 1247, 1249 (11th Cir. 1983); Holzsager v.

Valley Hospital, 646 F.2d 792, 797 (2nd Cir. 1981). Other courts, however, have insisted "[i]t is not necessary that each factor compel prospective application." Jones v. Consolidated Freightways, 776 F.2d at 1460. Accord, E.E.O.C. v. Gaddis, 733 F.2d 1378 (10th Cir. 1984); Jackson v. City of Bloomfield, 731 F.2d 652, 655 (10th Cir. 1984)(en banc); Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983). Rather, "the final determination involves pulling together the three factors for a careful balancing." Cash v. Califano, 621 F.2d 626, 629 (4th Cir. 1980); Jones, 776 F.2d at 1461. Compare also Northern Pipline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982)(all three

factors "mitigate against" retroactive application), and United States v. Johnson, 457 U.S. 537, 550 n.12 (1982)(factors two and three considered only if the first is satisfied), with Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)(balancing is required), and England v. State Board of Medical Examiners, 375 U.S. 411, 422 (1964)(same).

Fifth, the lower courts have disagreed on whether the Chevron analysis establishes a prescriptive rule for all subsequent cases or whether it should be applied on a case-by-case basis, with due regard for stare decisis. The Sixth Circuit expressly stated it did "not agree . . . that the equity inquiry called for in Chevron is to be made on a case-by-

case basis. The prospect of a separate statute of limitations for every section 301 plaintiff with a case pending when DelCostello came down is unacceptable." Smith v. General Motors Corp., 747 F.2d 372, 375 n.6 (6th Cir. 1984)(en banc). The Fifth Circuit took the same approach in construing Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983), that circuit's first ruling on DelCostello's retroactivity. Gray v. Local 714, I.U.O.E., 778 F.2d 1087 (5th Cir. 1985); Gray v. Amalgamated Meat Cutters Local 540, 736 F.2d 1055 (5th Cir. 1984). The Second Circuit in Welyczcko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 1984), also laid down a prescriptive rule, although

that circuit's subsequent decision in Byrne v. Buffalo Creek Railroad Co., 765 F.2d 364 (2nd Cir. 1985), belied the generalization. Judge Ervin's opinion below in Zemonick expressed approval of Edwards, Gray, and Welyczko, 762 F.2d at 396, and his analysis could certainly be accused of following their lead.

Meanwhile, other circuits have construed Chevron to require an individualized analysis for each case. E.g., Jones v. Consolidated Freightways, 776 F.2d 1458 (10th Cir. 1985); Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1984); Perez v. Dana Corp., 718 F.2d 581, 588 (3rd Cir. 1983). Although the analysis applicable to Chevron's first and second factors will often carry over from one

case to another, their impact can vary depending upon the prior law of the particular circuit and the law of the state in which the cause of action arose. See, e.g., Jones, supra; Zemonick, supra (panel majority opinion); Carpenter v. West Virginia Flat Glass, 763 F.2d 622 (4th Cir. 1985); Pitts v. Frito Lay, Inc., 700 F.2d 330 (6th Cir. 1983).

Not surprisingly, these differences among the circuits regarding the application of the Chevron analysis produced divergent holdings on the retroactivity of DelCostello. The Fourth, Sixth, and Eleventh circuits now hold that decision must be applied retroactively in all cases. Zemonick, supra; Smith, supra; Gray, sup-

ra. The First, Second, Third, Seventh, Eighth, and Eleventh Circuits have found DelCostello should be asserted retroactively in at least some, and probably most, cases. Graves v. Smith's Transfer Co., 736 F.2d 819 (1st Cir. 1984); Welyczko, supra; Perez, supra; Landahl v. PPG Indus., 746 F.2d 1312 (7th Cir. 1984); Lincoln v. District 9, I.A.M., 723 F.2d 627 (8th Cir. 1983); Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (1983). The Ninth and Tenth Circuits, however, have held DelCostello should not be applied retroactively, at least when such application would work to shorten the limitations period. Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985); Barina v. Gulf Trading Transp. Co., 726 F.2d 560 (9th Cir.

1984); Edwards v. Teamsters Local No. 36, supra; Jones, supra. Moreover, the Fourth and the Sixth Circuits' en banc decisions both overruled panel decisions refusing retroactive application, and the Second Circuit may well have an intra-circuit split on the question. See Byrne, supra (Van Graafeiland, J., dissenting).

The cases have splintered not only on the proper application of the Chevron analysis, but also on whether this Court decided the retroactivity question sub silentio in DelCostello itself. The Fourth Circuit below and the Second Circuit in Welyzcko concluded the DelCostello Court's application of § 10(b) to the cases before it resolved the issue conclusively. The Tenth Circuit in Jones spe-

cifically rejected that conclusion, reasoning that because the retroactivity issue was not presented in the petition for certiorari, argued by the parties, or discussed by the Court, no inference of a holding on that issue could be made.

The circuits' confusion over application of the Chevron analysis has repeated itself in their consideration of the retroactivity of this Court's decision in Wilson v. Garcia, 471 U.S. ___, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The split has been similar to that which developed around DelCostello. The Fifth, Sixth, and Eleventh Circuits have held, without qualification, that Wilson should be applied retroactively. Gates v. Spinks, 771 F.2d

916 (5th Cir. 1985); Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985); Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985). The Third, Ninth, and Tenth Circuits have refused retroactive application when it would work to shorten the statute of limitations. Al-Khazraji, supra; Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984). See also Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985); E.E.O.C. v. Gaddis, 733 F.2d 1373 (10th Cir. 1984).

Presumably, this Court recognized the circuits' disarray over the Chevron analysis when it granted certiorari in Al-Khazraji, ___ U.S. ___, 55 U.S.L.W. 3231 (1986). See also Mulligan v. Hazard, ___

U.S. ___, 54 U.S.L.W. 3808 (1986)(White & Marshall, JJ., dissenting from denial of cert.).

Appellants urge the Court to grant their petition for certiorari and adopt the approach that has been developed by the Third, Ninth, and Tenth Circuits: a decision establishing a new limitations period should not be applied retroactively to shorten the limitation and bar a claim that previously would have been timely if the plaintiff reasonably relied upon the prior rule and pursued his claim either before the new rule was announced or within a reasonable time thereafter.

## II. THE FOURTH CIRCUIT'S ANALYSIS CONFLICTED WITH THAT PRESCRIBED BY THIS COURT IN CHEVRON OIL CO. V. HUSON.

Relying upon the rationale in Judge Ervin's dissent from the panel decision, the Fourth Circuit strayed from the Chevron analysis in at least three significant regards; (1) it failed to accurately assess, from the plaintiffs'/ petitioners' perspective, the state of the law prior to their filing of this law suit; (2) it overlooked important distinctions in the present case and thus miscalculated the impact that a holding of nonretroactivity would have on the purposes behind the DelCostello holding; (3) it grossly misjudged the equitites in the case and ignored facts considered important by this

Court in its Chevron decision. The following discussion addresses, in turn, those errors.

In applying Chevron's first factor and determining whether DelCostello overruled clear past precedent, Judge Ervin's reasoning failed to view the law from the plaintiffs' perspective prior to their initiation of the litigation. But that approach must be taken to fairly assess whether the parties reasonably relied upon pre-existing law.

At the time petitioners' cause of action arose, the circuits were in considerable disagreement about the appropriate limitations periods for § 301/DFR claims. But the controversy centered solely on which state statute of limitations to

apply, not on whether to apply federal law or state law. All of the circuits to have considered the question--and there were at least eight of them--had followed the general rule set forth in Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966): "the timeliness of a § 301 suit . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations."

In that timeframe, § 301/DFR plaintiffs in West Virginia could rely on the Fourth Circuit's clear expression in Kennedy v. Wheeling Pittsburgh Steel Corp., 81 L.R.R.M. 2349 4th Cir. 1972), that such actions are to be governed by the state's limitation period of five years for con-

tract claims. This Court's holding in U.P.S. v. Mitchell, supra, did not change circumstances for West Virginia § 301 litigants. The state does not have a specific statute of limitations for vacating or enforcing arbitration decisions. Therefore, the Fourth Circuit's determination in Kennedy that the most appropriate state analogue was the contract statute of five years remained the controlling precedent. Moreover, the shortest limitation period reasonably possible under West Virginia law was two years.

Admittedly, Mitchell included Justice Stewart's concurrence advocating application of § 10(b)'s six month period and Justice Blackmun's intimation that he might also approve of that adoption. The

remainder of the Court expressed no opinion on the proposal. Yet Mitchell was not decided until one year after the petitioners' claims arose, and petitioners filed their complaint in this case just two months after that decision was handed down.

Thus, viewing the situation from the petitioners' perspective, for one year following their arbitration decisions, they diligently sought and encouraged three sets of lawyers to file their claims, and those lawyers operated under the reasonable assumption that the Kennedy decision gave them five years within which to file the complaint. After one year, Mithchell's holding left Kennedy intact

and raised no concern that a period shorter than two years could apply to them. The Mitchell concurrences suggested the possibility of § 10(b)'s application, although no court anywhere had yet issued such a holding and petitioners had no reason prior to that time to anticipate a six months limitation. Petitioners then moved quickly and in two months filed their complaint -- three years and ten months ahead of the deadline under the controlling law. Petitioners thus acted in reasonable reliance on prior law by postponing their law suit until fourteen months after their claims arose.

Judge Ervin's opinion insisted that a refusal to retroactively apply DelCostello to this case would frustrate DelCostello's

purposes. His analysis, however, failed to carefully account for the special facts presented here and not presented in the vast majority of § 301/DFR cases.

DelCostello cited three reasons for its holding: (1) to provide sufficient time for employees to vindicate their rights; (2) to provide for reasonably rapid resolution of labor disputes; and (3) to achieve uniformity on a matter of federal labor law. Obviously, allowing petitioners to proceed to the merits would not defeat this Court's concern -- perhaps the primary concern expressed in DelCostello -- that DFR plaintiffs have a reasonable time in which to file their claims.

The second and third DelCostello purposes would not be threatened by a holding of nonretroactivity here because only a handful of states are, like West Virginia, without a specific limitation period for arbitration appeals. See DelCostello, 462 U.S. at 166 n.15. It is only in those states where the problems of reliance and inequity could arise. Moreover, allowing petitioners to have their day in court would not (as argued by Judge Ervin) commit federal courts to hearing long-delayed DFR claims even in the few states without arbitration statutes. Rather, the other Chevron factors would require any plaintiffs to have moved quickly to court once DelCostello was decided -- much as petitioners did after

Mitchell.

Thus, the number of cases not subject to a retroactive application of DelCostello would be extremely small and there would be little compromise of DelCostello's concerns for uniformity and rapid resolution of labor disputes. When that marginal sacrifice is balanced against the degree to which nonretroactivity here would advance the DelCostello interest in providing a reasonable filing period for employees and against the substantial inequity that would result from retroactive application, the conclusion must be that this case should proceed to the merit

The Fourth Circuit also completely ignored the proper analysis, as delineated

by this Court in Chevron, of the equities of the case. First, Judge Ervin's opinion argued petitioners lacked diligence in pursuing their claims. Yet as already noted, petitioners acted on their claims with considerable alacrity, filing them almost four years before the deadline established by Kennedy and just two months after Mitchell was decided. In the world of litigation, fourteen months to file a case normally reflects some degree of diligence, not a lack of it -- especially when a case involves the substantial factual and legal complexities that are present in this case. (See the summary of the pleadings in the district court's opinion, reprinted in the Appendix at 81-84.)

Second, Judge Ervin contended petitioners failed to offer "any sympathetic or justifiable reason" for not filing their case more quickly than they did. Yet according to affidavits submitted by Mr. Zemonick, his former counsel, and his present counsel, plaintiffs engaged an attorney immediately after their discharge to represent them in getting their jobs back. When that attorney did not act quickly enough, and after four months had not yet filed a law suit, petitioners hired another lawyer, one with more experience in labor law. The second attorney, however, also proved to be too slow to satisfy the plaintiffs. They therefore released him and hired a third lawyer, who filed this action a short while later.

Thus petitioners pursued their claim quickly and diligently, and were prevented from filing within six months only by their lawyers, who labored under the reasonable impression they had five years before any deadline threatened them. (Petitioners did timely file complaints with the National Labor Relations Board.) Admittedly, delays by counsel cannot be the basis for tolling a statute of limitations. But when considering the equities in a Chevron analysis, such facts do become relevant.

Finally, the Fourth Circuit dismissed as insignificant the considerable investment in time and money petitioners had made in pursuit of their claims in the

district court. "[N]early every plaintiff," wrote Judge Ervin, "will have 'expended considerable time and money' during the trial preparation stage." 762 F.2d at 395. That premise could be seriously questioned -- especially when comparing cases that have the factual and legal complexitites of this one with more simple, one issue-one party cases. But even assuming its validity, the premise still missed the mark. It is relevant to the equitites just how far the petitioners had progressed into the litigation before they were suddenly ousted by an abrupt change in the law. Here, petitioners had proceeded to the edge of final determination with cross motions for summary judgment fully briefed and pending before the dis-

trict court.

This Court in Chevron, while deciding against retroactivity, emphasized the inequity of terminating a "lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year . . .." Here, plaintiffs proceeded through almost three years of pretrial preparation and had submitted the significant portion of their claims for resolution on the merits. As Judge Haynesworth exclaimed in his majority opinion for the original panel in this case, "it is difficult to imagine a greater inequity than to have the courthouse door suddenly slammed in the faces of the plaintiffs at a time when they apparently stood on the eve of decision on

the merits."*

The Fourth Circuit therefore significantly departed from the analysis prescribed by this Court in Chevron Oil Co. v. Huson.

## III. THE COURT OF APPEALS' SUB SILENTIO APPLICATION OF § 10(b)'S SIX MONTH LIMITATION TO PETITIONERS' LAW AND PUBLIC POLICY CLAIM CONFLICTS WITH THIS COURT'S DECISIONS IN AUTO WORKERS V. HOOSIER CARDINAL AND DELCOSTELLO V. TEAMSTERS.

The primary thrust of petitioners' complaint and of the litigation in the

*The inequity of the situation was exaggerated in this case because defendants never raised the statute of limitations defense until after DelCostello was decided -- over two years into the litigation. That failure by the defendants also supports petitioners' position that DelCostello marked a departure in the law for West Virginia litigants that was not reasonably foreseeable.

district court focused on their claim that their discharges violated law and public policy. That claim contended the standards applied by the employer and the arbitrators, pursuant to decisions promulgated by the Arbitration Review Board under a former U.M.W.-B.C.O.A. contract, were so grossly overbroad and vague they severely invaded the free speech and other rights of miners. The petitioners' underlying theories were premised upon interpretations of federal and state constitutional provisions, state tort law, and the National Labor Relations Act. Essentially, petitioners contend the challenged standards permit discharge of any miner who is identified in the vicinity (a very loosely defined area) of a mine during a

wildcat strike, regardless of whether the miner is engaged in legitimate communication or in wholly innocent activity. (For example, one of the petitioners was discharged after he was identified in his front yard, which happened to be about two miles from a mine.)

The Fourth Circuit failed to directly address petitioners' contention that their law and public policy claims are not governed by the statute of limitations in § 10(b), but are controlled by the most appropriate state analogue. The Circuit Court's failure must therefore be taken as a sub silentio denial of petitioners' contention. That ruling squarely conflicts with this Court's decisions in

DelCostello and Auto Workers v. Hoosier Cardinal, 383 U.S. 696 (1966).

Hoosier Cardinal expressly rejected the argument that § 10(b) should be applied to § 301 contract enforcement suits: "although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." 383 U.S. at 702-03. DelCostello left intact the presumption relied upon in Hoosier Cardinal that "absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions." DelCostello, 462 U.S. at 158 n.12. The Court cautioned that its hold-

ing there "should not be taken as a departure from prior practice in borrowing limitations for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eshew use of state limitations periods anytime state law fails to provide a perfect analogy." 462 U.S. at 171.

DelCostello concluded the the general presumption in favor of state limitations was overcome in that case by two concerns: (1) the practical difficulties created by the unusual hybrid nature of § 301/DFR actions, and (2) the interplay of the limitations periods with federal labor policy. As shown below, neither of those is present when dealing with law and pub-

lic policy challenges to arbitration decisions.

DFR litigation generally requires a plaintiff to essentially prove two law suits -- that the union violated its duty to fairly represent the plaintiff in the grievance process and that the employer violated plaintiff's rights under the collective bargaining agreement. This bifurcated proof requirement meant no analogous state statute of limitations neatly fit both theories.

Petitioners' law and public theory, however, is not a hybrid action. It proceeds only against the employer and requires determination of only one claim for relief. There is, therefore, no complication from applying one statute to one

defendant and another limitation to another defendant. Moreover, as explained below, state limitations on contract actions comfortably fit such a claim.

DelCostello's second concern -- that relating to the interplay with federal labor law -- is similarly inapplicable. DelCostello emphasized the duty of fair representation almost invariably raises the probability of an unfair labor practice. That being so, the § 10(b) limitation would be most appropriate, given its primary application in unfair labor practice cases under § 8 of the N.L.R.A. In addition, DelCostello highlighted an important federal labor policy in giving adequate time for employees to protect

their N.L.R.A. rights and in providing for speedy resolution to grievance disputes. Commercial arbitration laws defeated the former policy and the extended time for malpractice statutes cut against the latter.

In cases of law and public policy challenges to arbitration decisions, those practicalities are either nonexistent or greatly minimized. Although a portion of petitioners' claim raises analogies to unfair labor practice law, much of the argument focuses on laws and policies created in constitutional or other statutory provisions. More importantly, law and public policy challenges, when viewed in their generic form, rarely raise unfair labor practice issues. Certainly, that

theory is not restricted to concerns of federal labor policy.

DelCostello's concern for giving employees adequate time to vindicate their federal labor law rights would certainly not be endangered by adopting a state contract or tort statute of limitations. The additional concern for encouraging quick resolution of labor disputes is overridden by countervailing considerations in the underlying theory of petitioners' claim that the arbitrators' standards violate law and public policy. While it would be desirable to quickly resolve any issues relating to the construction of a collective bargaining agreement, rapid resolution cannot be as

important as the paramount "public policies" -- whether legislatively or constitutionally imposed -- that form the basis of the claim for relief. If those policies are not paramount in a given case, then that merely means the plaintiffs lose on the merits. Because of the importance of the societal interest in our laws and public policies, there needs to be some mechanism by which parties can raise such issues without the restriction of a relatively severe statute of limitations. If nothing else, the complexity that invariably attends such cases would militate toward a more comfortable limitation.

Finally, there is an easily identifiable and precise state analogue available. The petitioners' theory is essen-

tially a very traditional contract action. From the earliest days of common law development, contracts have been subject to challenge for inconsistency with laws and public policy. See, e.g., Billingsley v. Clelland, 41 W.Va. 234, 244 , 23 S.E. 812, 815 (1895); WILLISTON ON CONTRACTS §§ 1628-30. This case, therefore, bears a telling resemblance to the facts in Hoosier, which applied the state contract limitations. As in Hoosier,

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreeement. Such an action closely resembles an action for breach of contract cognizable at common law."

383 U.S. at 705 n.7.

The crucial distinction between Del-

Costello, on the one hand, and Hoosier Cardinal and this case, on the other, is apparent. DelCostello selected the most appropriate limitations for a hybrid action that originated only upon the passage and case law development of the modern federal labor statutes. But Hoosier selected the most appropriate limitation for a traditional, single-defendant contract claim. Petitioners' law and public policy action fits that latter mold and thus requires a similar statute of limitation attend it.

## CONCLUSION

This petition for certiorari should be granted to resolve serious conflicts in the circuits and clarify important and recurrent isses regarding the Chevron analysis and § 301 litigation.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Michael Zemonick, et al.,
Appellants,

v. No. 84-1353

Consolidation Coal Company,
a corporation, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, District Judge. (C/A 81-36).

Argued: February 3, 1986 Decided: July 28, 1986

Before RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges and HAYNSWORTH, Senior Circuit Judge.

Robert M. Bastress (Barbara J. Fleischauer; West Virginia College of Law on brief) for Appellants; Robert M. Steptoe, Jr. (C. David Morrison; Steptoe & Johnson) for Appellee Consolidation Coal Company; (Michael J. Aloi; Manchin, Aloi & Carrick on brief) for Appellee District 31, United Mine Workers of America

*Chief Judge WINTER did not participate.

PER CURIAM:

The district court dismissed these hybrid § 301/DFR claims as barred by the six months limitation period established by the Supreme Court of the United States in DelCostello v. Teamsters, 462 U.S. 151 (1983). The plaintiffs appealed to this court, and the majority of the three judge panel hearing the appeal reversed the district court, holding that DelCostello should not have been given retroactive effec in this case, and remanding the case to the district court for further proceedings. Zemonick v. Consolidation Coal Co., 762 F.2d 381 (1985). One member of the panel dissented, expressing the views (1) that the supreme Court in DelCostello had already resolved the issue of retroactivity against the plaintiffs and (2) even if it is appropriate to conduct an independent

analysis of retroactivity under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Chevron factors require that DelCostello be given retroactive rather than prospective application to these facts.

A majority of the active judges of this court subsequently voted to give en banc consideration to the issues raised by this appeal. Following briefing and oral argument, it was held that the district court did not err when it applied DelCostello retroactively in this case and that the decision of the court should be affirmed. Since the rationale for the en banc court's decision is adequately reflected in the dissenting opinion in Zemonick v. Consolidation Coal Co., 762 F.2d 381, 389-397 (1985), no useful purpose would be served by repeating it here.

AFFIRMED.

HAYNSWORTH, Senior Circuit Judge, with whom Judge Russell and Judge Hall join, dissenting:

I dissent for the reasons set forth in the majority panel opinion in Zemonick v. Consolidation Coal Co., 762 F.2d 381, 382-89 (4th Cir. 1985).

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Michael Zemonick, et al.,
Appellants,

v. No. 84-1353

Consolidation Coal Company,
a corporation, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, District Judge. (C/A 81-36).

Argued October 3, 1984 Decided May 22, 1985

Before HALL and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge

Robert M. Bastress (Barbara J. Fleischauer on brief) for Appellants; Robert M. Steptoe, Jr. (C. David Morrison; Michael J. Aloi, Manchin & Aloi on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

Plaintiffs, eleven former employees of Consolidation Coal Company, were discharged for allegedly instigating a wildcat strike. Each plaintiff took his discharge to arbitration, where the dismissals were upheld. In July 1981, approximately sixteen months after the discharges and thirteen months after the last of the arbitration decisions upholding the discharges, the plaintiffs commenced this action in a state court against the employer and the union. They asserted Vaca-Hines[1/] hybrid claims, charging the employer with a breach of the collective bargaining agreement and the union with failure to discharge its duty of fair representation in the grievance and

1. Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

arbitration proceedings.

The employer removed the case to the United States District Court for the Northern District of West Virginia where the parties commenced extensive discovery and pretrial proceedings, culminating in cross motions for summary judgment. There was no suggestion that the commencement of the proceedings were untimely until July 11, 1983, after the decision of the Supreme Court of the United States in DelCostello v. Teamsters, ___ U.S. ___, 103 S.Ct. 2281 (1983). In DelCostello, the Supreme Court held for the first time that such hybrid § 301/DFR claims are subject to the six months period of limitations in § 10(b) of the National Labor Relations Act[2/] which governs the filing of charges of unfair labor practices with the National Labor

2. 29 U.S.C.A. § 160.

Relations Board. Noting that this court, in Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983), had held that DelCostello was to be applied retroactively, the district court dismissed this action as having been barred by the six months limitation period.

Because the circumstances of this case are quite different from those presented in Murray and because, with respect to these West Virginia plaintiffs, DelCostello represented an abrupt change from what appeared to have been settled law, we think DelCostello was improperly given retroactive effect in this case.

I.

Since there was no federal statute of limitations directly applicable to actions against an employer under § 301(a) of the

Labor Management Relations Act,[3/] the Supreme Court held in United Autor Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), that the court should borrow from state law the period of limitations most analogous to such an action. Accordingly, this court held in Kennedy v. Wheeling-Pittsburgh Steel Corp., 81 L.R.R.M. 2349, 69 CCH Labor Cases P 12,980 (4th Cir. 1972), that the applicable period of limitations for hybrid actions such as this was supplied by West Virginia's statute limiting actions on oral contracts to five years. See also Howard v. Aluminum Workers International Union, 589 F.2d 771 (4th Cir. 1978).

In the interim between the decisions of the Supreme Court in Hoosier Cardinal Corp.

3. 29 U.S.C.A. sec. 185(a).

and DelCostello, there was another significant decision of that Court. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). The United States District Court for the Eastern District of New York had held that Mitchell's claim was governed by New York's ninety day statute of limitations applicable to actions to overturn an arbitration award. The United States Court of Appeals for the Second Circuit had reversed, 624 F.2d 394 (1980). The Court of Appeals had held that the relevant statute was New York's six year statute applicable to actions on contracts. The employer, but not the union, sought and obtained a writ of certiorari, and the Supreme Court, agreeing with the district court, held that the action against the employer was barred by New York's ninety day limitation upon actions to set aside an

arbitration award. Mr. Justice Stewart, in a separate concurrence, embraced the position of the AFL-CIO, as amicus curiae, that the controlling limitations period should be taken from § 10(b) of the National Labor Relations Act, but the other members of the Court declined to consider that contention since it had not been advanced by either of the parties. Justice Stevens filed a separate opinion in which he emphasized the fact that the Court did not have before it the question of the applicable period of limitations to the claim against the union, and contended that the ninety day period for actions attacking an arbitration award should not be applied to the claim against the union.

So matters stood when this action was filed in West Virginia. Most of the states have very short periods of limitation, typically ninety days, for actions seeking to

overturn an arbitration award, but West Virginia is one of the few states that has statute specifically applicable to such actions. Thus, the holding of the Supreme Court in Mitchell had no relevance to the question of timeliness of the commencement this action in West Virginia. A careful lawyer might have given some consideration the straw in the wind to be found in Justi Stewart's concurring opinion in Mitchell a the declination of the other justices to consider the contention, but the controlli authority remained Hoosier Cardinal Corp. applicable period of limitations was to be borrowed from state law, and, since West Virginia had no statute specifically applicable to suits to overturn arbitratio awards, our earlier decision holding that timeliness question was governed by West

Virginia's five year statute for the commencement of an action on an oral contract was controlling.

II.

Nothing the Supreme Court did in DelCostello forecloses our consideration of the retroactive application of that decision, in the circumstances of this case, under the standards of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). In DelCostello, the Supreme Court applied the new rule to the plaintiffs in the two consolidated cases before it, but in neither case was there a potential problem with retroactive applicable under the Chevron standards.

DelCostello, himself, brought this action in the District Court of Maryland, and, under Mitchell, the district court properly held that the applicable limitations period was that contained in Maryland's

thirty day statute for actions to vacate an arbitration award. 524 F. Supp. 721 (D. Md. 1981). This court affirmed on the district court's opinion. 679 F.2d 879 (4th Cir. 1982) (Mem.). Thus, the "retroactive" application of DelCostello's new rule to DelCostello, himself, had the effect of increasing the limitations period, not decreasing it. Indeed, the Supreme Court remanded DelCostello's case for consideration of possible tolling so as to make the filing of the complaint timely under the new six months rule. DelCostello thus benefited from the retroactive application of the new rule, and in no sense was hurt by it.

Flowers, the plaintiff in the consolidated case decided with DelCostello, suffered a dismissal of his action in the Western District of New York. That court held

that the relevant limitations period was the ninety day period provided by New York's statute for the commencement of actions to vacate an arbitration award. The Court of Appeals for the Second Circuit reversed, holding that the relevant period for both branches of the claim was New York's six year statute for the commencement of actions on contracts. 622 F.2d 573 (2nd Cir. 1980) (Mem.). That decision, however, was vacated by the Supreme Court, which remanded the case to the Court of Appeals for reconsideration in the light of Mitchell. Upon reconsideration, that court held, as required by Mitchell, that the action against the employer was barred by the ninety day statute for actions to vacate arbitration awards but that the claim against the union was governed by New York's three year statute for the commencement of actions for malpractice.

Flowers v. United States Steel Workers of America, 671 F.2d 87 (2d Cir. 1982). The Supreme Court's application of the new six month rule to both branches of the claim thus enlarged the applicable period of limitations for the claim against the employer. It reduced the limitations period held to be applicable by the Court of Appeals for the Second Circuit, but enlarged the limitations period initially held to be applicable by the district court. In any event, from the outset, Flowers was aware of New York's ninety day limitation period for the commencement of an action to set aside an arbitration award, and was chargeable with knowledge that the ninety day period might be held to be the relevant one, just as the district court had held.

Neither DelCostello nor Flowers was in a

position to claim that the decision in DelCostello, in application to him, would substantially and unfairly disadvantage him. No one would have perceived any retroactivity problem if, when the case first came before it, the Supreme Court had reversed the Court of Appeals for the Second Circuit in Flowers and held that the district court was correct initially in applying the ninety day period for actions to vacate arbitration awards.

Application of the new rule to the two cases before the Court simply does not suggest that, in other cases, application of the new rule, under quite different circumstances, might not appropriately call for consideration of a retroactive application under the Chevron standards.

Nevertheless, two courts of appeals have held that the Supreme Court's decision in

DelCostello, itself, forecloses any consideration of a contention that its rule be applied only prospectively. Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 512 (1984), Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984). See also Gray v. Amalgamated Meat Cutters Local 540, 736 F.2d 1055 (5th Cir. 1984).

The plaintiff in Welyczko had waited five years to commence his action, and he should have known that a much shorter limitations period might be held applicable to him, particularly New York's ninety day period for the commencement of an action to vacate an arbitration award. The case simply presented no occasion for a detailed analysis under Chevron.

The position of at least some of the plaintiffs in Smith seems to have been

different, but the majority of the en banc court for the Sixth Circuit chose to follow Welyczko and what it understood to be the lead of other circuits, including this one, in giving retroactive application to DelCostello, apparently without noticing that in those cases, application of the DelCostello rule had had the effect of enlarging, rather than shortening, the applicable period of limitations. One judge concurred in the judgment, but not in the reasoning of the majority. He had been through a Chevron analysis in Lawson v. Truck Drivers, 698 F.2d 250 (6th Cir. 1983), cert. denied, 104 S.Ct. 69 (1983), and he thought that case required a retroactive application of DelCostello in Smith. Two[4/] judges

4. Earlier, the Court of Appeals for the Sixth Circuit in Badon v. General Motors (continued)

dissented.

In any event, in this case, under circumstances in which a retroactive application of DelCostello presents manifest unfairness, we decline to follow Welyczko and Smith.

III.

Resolution of the question of retrospective application of the decision of the Supreme Court in DelCostello is controlled by the guidelines laid down in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

Corp., 679 F.2d 93 (6th Cir. 1982), after the Supreme Court's decision in Mitchell but before its decision in DelCostello, picked up Justice Stewart's position in Mitchell and held that the six month period of sec. 10(b) of the National Labor Relations Act applied to the hybrid claim. In Pitts v. Frito Lay, Inc., 700 F.2d 330 (6th Cir. 1983), the Sixth Circuit held that its decision in Badon was a significant departure from earlier precedent and, under the Chevron standards, would not be applied retroactively.

Under those guidelines, we are to consider whether the decision in DelCostello overruled "clear past precedent on which litigants may have relied," whether "retrospective operation would further or retard [the new law's] operation" and whether an "inequity [is] imposed by retroactive application." Applying these guidelines we think the DelCostello decision should not be applied retroactively in this case.

A.

In the context of West Virginia's statutes, the decision in DelCostello was a clean break with the past. It overruled direct precedent in this court upon which the plaintiffs in this case justifiably relied.

Since, as we have noted, West Virginia, unlike the great majority of the states, has no statute of limitations expressly

applicable to actions to vacate arbitration awards, we had determined that the applicable statute under the rule of United Auto Workers v. Hoosier Cardinal Corp. was West Virginia's five year statute applicable to actions upon oral contracts. Kennedy v. Wheeling-Pittsburgh Steel Corp., 81 L.R.R.M. 2349, 69 CCH Labor Cases P. 12,980 (4th Cir. 1972). See also Howard v. Aluminum Workers International Union, 589 F.2d 771 (4th Cir. 1978). That appears to have been the settled rule which remained unquestioned until after the Supreme Court's decision in DelCostello came down. Indeed, in their responsive pleadings, the defendants in this case raised no question of the timeliness of the filing of the complaint. They responded to the merits, and both the plaintiffs and defendants proceeded with extensive pre-trial discovery and preparation until the filing of

cross-motions for summary judgment on the merits.

Neither party seems to have thought that the decision of the Supreme Court in United Parcel Service v. Mitchell created any possible question of timeliness. In retrospect, we cannot say that it did. Since West Virginia had no statute expressly dealing with limitations upon actions for the vacation of arbitration awards, the holding in Mitchell had no direct application to an action commenced two months later, as this one was, in West Virginia. The only possible relevance of the opinions in Mitchell stems from the concurring opinion of Justice Stewart in which he expressed the thought that the courts in these hybrid actions should not borrow state statutes of limitations but should borrow the six months

limitation for the filing of charges of unfair labor practices under § 10(b) of the National Labor Relations Act. No other justice joined him in that suggestion; they simply declined to consider it. From Justice Stewart's opinion and the circumstances under which the other justices declined to even consider the suggestion that § 10(b) was controlling, one might have speculated that in some later case other justices might join Justice Stewart, but the opinions in Mitchell hardly gave fair warning of what was to come in DelCostello. A lawyer in West Virginia still might have placed reasonable reliance upon the still controlling authority of United Auto Workers v. Hoosier Cardinal Corp. and the decisions of this court holding that the most relevant of West Virginia's statutes of limitations was the limitation upon actions upon oral contracts. We simply do not

think that the lawyers for the plaintiffs and defendants in this case can be faulted for not having found in the opinions in Mitchell a clear foreshadowing of the decision in DelCostello.[5/]

At the time this action was filed, therefore, the applicable precedents clearly gave the plaintiffs five years within which to commence their action. The action was filed well within that time by the third lawyer retained by the plaintiffs; the first two having been dismissed for failure to proceed with the alacrity expected of them by the plaintiffs.

In Murray v. Branch Motor Express Co.,

5. It may bear mention that the complaint in this action was filed just over two months after the decision in Mitchell was announced. The decision in Mitchell was announced on April 20, 1981, and the complaint in this case was filed on June 26, 1981.

723 F.2d 1146 (4th Cir. 1983), we held that the decision in DelCostello was to be applied retroactively, approving a statement in Perez v. Dana Corp., Parish Frame Div., 718 F.2d 581 (3rd Cir. 1983), that the decision in DelCostello was not an abrupt break with past precedent upon which the plaintiff might reasonably have relied. The law as it existed before DelCostello was described as erratic and inconsistent. In the context of Murray, the description was appropriate. The case had arisen in Maryland, and the district court had applied Maryland's thirty day statute applicable to actions to vacate arbitration awards. By early 1983 it might have been thought that the question, under Maryland's statutes, had been settled by the Supreme Court's decision in Mitchell, but the course of decision there, and in most of the rest of

the country, had certainly been erratic. Nor had Mitchell settled all of the problems, because a few of the states had no statutes expressly applicable to actions to vacate arbitration awards, and some of those that had such statutes had an unreasonably short period of limitation, such as Maryland's thirty day period.

Similarly, in Sine v. Local No. 992 International Brotherhood of Teamsters, 730 F.2d 964 (4th Cir. 1984), we held DelCostello retroactively applicable to an action commenced in the District of Maryland. The district court had dismissed the action as untimely under Maryland's thirty day statute for the commencement of actions to vacate arbitration awards. The action had been commenced within six months of its accrual, so that the retroactive application of DelCostello did not introduce the question of

timeliness but eliminated it.

Nothing in Murray or Sine, therefore, is applicable to the problem we face. In West Virginia, the prior law had neither been erratic nor inconsistent. Indeed, the responses of the defendants in this case indicate that in June 1981, West Virginia lawyers did not think that any limitations period shorter than West Virginia's five year contract claim statute was, or might be, applicable to this action. Established precedent justified that belief.

B.

A conclusion that DelCostello should be applied prospectively only in the circumstances of this case would not be disruptive of any great design of the laws of the United States.

Unquestionably one of the underlying

policies of the laws of the United States favors relatively quick resolution of labor disputes and controversies arising out of collective bargaining agreements. This is strongly suggested by the six month limitation for the filing of unfair labor practice charges under § 10(b) of the National Labor Relations Act. The Court's specific endeavor in DelCostello, however, was to enlarge the short period of limitations authorized by Mitchell in states having statutes of limitations specifically applicable to actions to vacate arbitration awards. Maryland's thirty day period and the typical ninety day period were simply too short to permit inexperienced and uncounseled employees to obtain lawyers and to file their complaints. The Court, too, was impressed by the fact that § 10(b) provided a more apt analogy than state statutes enacted without

regard to controversies arising under federal labor relations laws. Borrowing the federal limitations period contained in § 10(b) would also provide a uniform rule applicable throughout the country and without regard to varying state statutes.

None of these general policies or considerations would be furthered or promoted by a holding that the new rule should not be retroactively applied in the circumstances of this case. Equally strong or stronger, however, is the federal policy exemplified by DelCostello itself, that aggrieved employees should have a fair opportunity to file their Vaca-Hines complaints. That policy would surely be subverted by retroactive application of the DelCostello six months limitation to an action that had been filed without extraordinary delay and which had

proceeded to a development of the issues on the merits to the point of decision on cross-motions for summary judgment without any question of timeliness having been raised.

Moreover, those other general considerations would not be subverted by a limitation of DelCostello to prospective application in the circumstances of this case. The implementation of those policies would not be significantly retarded. There are only a few states which have no statutes limiting commencement of actions to vacate arbitration awards. Recognition that actions arising in those states require separate consideration would occasion some slight delay in complete implementation of the DelCostello rule in those states, but that delay is not of great moment, and, in those states, DelCostello's bar would unerringly and indisputably finally fall a few months

after DelCostello was announced in June of 1983. Hence, a holding that DelCostello should not be retrospectively applied in this case favors the general policy of fairness without substantially detracting from early implementation of other federal policies underlying the decision in DelCostello.

C.

A retroactive application of DDelCostello in the circumstances of this case shouts of inequity. If we assume, as we must, that the plaintiffs have meritorious claims upon which they were entitled to prevail, or, at least, to a reasoned decision on the merits, belated erection of a procedural bar is an unwarranted frustration of their reasonable expectations of adjudication on the merits.

When the complaint was filed, it was

well within the alloted time under the established precedent of this court. We had borrowed the most analogous of West Virginia's statutes of limitations under the direction of the Supreme Court in Auto Workers. Neither defendant raised any question of timeliness, for, under the state of law as it existed in June 1981, the filing of a motion to dismiss would have appeared only a futile and wasteful imposition upon the court and counsel. Instead, for almost two years before DelCostello came down, the parties devoted themselves to pretrial discovery and preparation. Before any suggestion of untimeliness was made, cross motions for summary judgment had been filed. The case apparently was ready for final determination on the merits. The plaintiffs have expended considerable time and effort in the development of their case on the merits;

they had a considerable investment in the prosecution of their claims. Under these circumstances, it is difficult to imagine a greater inequity than to have the courthouse door suddenly slammed in the faces of the plaintiffs at a time when they apparently stood on the eve of decision on the merits. They had been long in the court, and their cases were fully developed when the district judge announced, in effect, that he was closing the book because the plaintiffs should never have crossed the threshhold of the courthouse door more than two years earlier.

Given the reasonable reliance of the plaintiffs upon what appeared to be established and solid precedent and the full development by the parties of their proofs on the merits, equity and fairness required that

the court not abruptly turn a deaf ear to them.

Another panel of this court considered a comparable situation in Peterson v. Air Line Pilots Assn., ___ F.2d ___ (No. 84-1186, 4th Cir. 1985). It refused to apply the DelCostello bar on the ground that the defendant had waived its right to assert the bar. In doing so, however, it emphasized the inequity of enforcing a time bar in a case in which there had been extensive pretrial discovery and preparation with no suggestion of a problem of timeliness. In this case, the plaintiffs did not contend that the defendants had waived their right to assert the time bar, but the inequity of applying the six months time bar here is equally as apparent as it was in Peterson. We reach the same result under a Chevron analysis.

IV.

There are a number of cases applying DelCostello retroactively in which the plaintiff would otherwise have been held barred by a shorter period of limitations or in which there was reasonable notice that a shorter period might be held applicable.[6/] Those cases do not bear upon our problem, for there was no inequity involved.

The Ninth Circuit was held DelCostello not to be applied retroactively in cases in

6. Perez v. Dana Corp., Parish Frame Div., 718 F.2d 581 (3rd Cir. 1983);
Storck v. International Brotherhood of Teamsters, Local Union No. 600, 712 F.2d 1194 (7th Cir. 1983);
Andres v. Local 600, International Brotherhood of Teamsters, 724 F.2d 73 (8th Cir. 1983);
Askew v. F & W Express, Inc., 723 F.2d 624 (8th Cir. 1983), cert. denied, ___ U.S. ___, 105 S. Ct. 292 (1984);
Arrow v. Pulitzer Publ Co., 723 F.2d 622 (8th Cir. 1983);
Hand v. International Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983).

which there had been substantial development of the merits. Barina v. Gulf Trading & Transportation Co., 726 F.2d 560 (9th Cir. 1984), Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1399 (1984).

The District Court for the Northern District of West Virginia similarly held that DelCostello was not to be applied retroactively to require the dismissal of a West Virginia claim such as this. Sole v. Thoroughfare Markets, Inc., 571 F. Supp. 1233 (N.D. W.Va. 1983).

Moreover, after anticipating the Supreme Court's holding in DelCostello, in Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982), the Court of Appeals for the Sixth Circuit held, in Pitts v. Frito Lay, Inc., 700 F.2d 330 (6th Cir. 1983), that the new

six months limitation borrowed from § 10(b) of the NLRA should not be applied retroactively.

There are a few cases going the other way. Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984), Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 292 (1984), and Edwards v. Sea-Land Services, Inc., 720 F.2d 857 (5th Cir. 1983). In those cases, however, the Chevron analysis was not so clearly weighted in favor of a prospective limitation. In one, there was no apparent reliance upon clearly established earlier precedent. Edwards. In another, there had been no substantial investment in time or money in the preparation of the case on the merits since the motion to dismiss on limitation grounds had been filed promptly after the filing of the complaint. Graves.

In this case in which the equities weigh so strongly against a retroactive application of DelCostello and in which defense counsel as well as plaintiffs' counsel saw no problem about timeliness until after DelCostello was decided and this case was ready for disposition on the merits, we think that the Chevron analysis properly leads to a conclusion against retroactive application of DelCostello.

This problem will shortly go away, if it is not already gone, but we think these plaintiffs should have "a satisfactory opportunity" to have their cases decided on the merits, an opportunity which the Supreme Court in DelCostello clearly sought to protect.

V.

The judgment of the district court dismissing the complaints is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

ERVIN, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that DelCostello should only be given prospective effect in this case. In my view, the majority has strayed afar from the Supreme Court's clear command in DelCostello itself to apply the six-month statute of limitations retroactively even where, as here, a § 301/DFR claim that would be timely under the applicable statute statute is time barred under DelCostello. Although the Supreme Court's retroactive application of DelCostello makes an independent analysis of retroactivity unnecessary, I am also convinced that the majority has misapplied the Chevron[1/] test in this case. For these reasons, I respectfully dissent and would affirm the judgment of the district court.

1. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

I.

The Supreme Court Has Already Resolved The Question of Retroactivity

For reasons that are unclear to me, the majority has essentially ignored the Supreme Court's retroactive application of the six-month limitations period for § 301/DFR claims in DelCostello and its companion case.[2/] DelCostello brought his § 301/DFR claim nearly eight months after his cause of action arose. 462 U.S. at 155. The district court held that DelCostello's claim was time barred under Maryland's 30-day statute of limitations for actions to vacate arbitration awards. Id. at 156. The Supreme Court, however, applied the six-month limitations period retroactively and remanded DelCostello

2. DelCostello was consolidated with United Steelworkers v. Flowers, 462 U.S. 151 (1983).

back to the district court to determine whether certain events not inquired into below had operated to toll the running of the statute of limitations.[3/] Id. at 172. The Supreme Court also applied the six-month statute of limitations retroactively in Flowers. Id. The plaintiffs in Flowers allowed ten months to elapse after their cause of action arose before they filed suit. Id. Although the Second Circuit found their suit to be timely under a three-year state statute of limitations, the Supreme Court retroactively applied the six-month limitations period and dismissed the suit as time barred. Id.

As the majority points out, Zemonick's

3. On remand, the district court refused to toll the running of the six-month limitations period for § 301/DFR claims and dismissed DelCostello's suit. DelCostello v. Teamsters, 588 F. Supp. 902, 909-11 (D. Md. 1984).

suit is timely under the applicable West Virginia statute of limitations but would be untimely under the DelCostello rule. On this basis, our previous decisions[4/] in which we applied DelCostello retroactively may be distinguished insofar as the six-month limitations period exceeds the time allowed under the applicable state statutes in each case. Application of DelCostello retroactively in those cases, therefore, extended rather than curtailed the time within which a § 301/DFR claim could be filed. The Supreme Court's holding in Flowers, however, cannot be distinguished for the same reason. The applicable state statute

4. Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983) cert. denied, 105 S. Ct. 292 (1984); Sine v. Local 992, International Brotherhood of Teamsters, 730 F.2d 964 (4th Cir. 1984).

of limitations gave the Flowers' plaintiffs thirty-six months to file their suit, thirty months more than the six permitted under DelCostello. Nevertheless, the Court retroactively applied DelCostello and dismissed their suit.

However unwise or unfair we may believe the retroactive application of DelCostello would be to this case, we cannot refuse to recognize "the Supreme Court's directive on this issue." Welyczko v. U.S. Air, Inc., 733 F.2d 239, 241 (2d Cir.), cert. denied, 105 S.Ct. 512 (1984); accord Smith v. General Motors Corp., 747 F.2d 372, 375 (6th Cir. 1984) (en banc)[5]; Campbell v. McLean

5. In Smith, the Sixth Circuit sitting en banc reasoned:

> If the Supreme Court had not intended for DelCostello to apply retroactively, the Court easily could have reserved this issue or could have applied the statute of limitations prospectively, as it did (continued)

Trucking Co., 592 F. Supp. 1560, 1562 (E.D. N.Y. (1984); see also Goins v. Teamsters Local 639, 598 F. Supp. 1151, 1154 (D. D.C. 1984) (dictum). Nevertheless, the majority asserts that "[n]othing the Supreme Court did in DelCostello forecloses" a Chevron inquiry into retroactivity here because no "potential problem with retroactive application" under Chevron existed in DelCostello and its companion case. Surely had the Court felt that in some cases retroactive application of DelCostello might be inappropriate, it would

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in Chevron. By applying the statute of limitations to extinguish the claim in the case before the Court, we feel the Supreme Court demonstrated its intent to apply DelCostello retroactively.

747 F.2d at 375. From this reasoning, the Sixth Circuit Concluded that the six-month statute of limitations for § 301/DFR claims "is applicable to all cases pending at the time DelCostello was decided." Id. (emphasis added).

have adopted a case-by-case approach to the retroactively question by conducting a Chevron analysis. Yet the Court unmistakably refused to adopt the case-by-case retroactivity analysis necessary under Chevron by directly applying the six-month limitations period to the cases before it. Under the majority's position, courts could completely dispense with a Chevron analysis when retroactive application of DelCostello would increase the limitations period. But those same courts would have to conduct the Chevron inquiry where, as here, retroactive application of DelCostello would decrease the applicable limitations period. A case-by-case approach, however, means exactly what it says: each case must be examined on the basis of its own peculiar facts to determine the appropriate result under the relevant test. The Supreme Court declined to adopt the

Chevron case-by-case approach and we are bound to do the same. Consequently, a Chevron analysis in this case is unnecessary and DelCostello should be applied retroactively to bar Zemonick's suit. Welyczko, 733 F.2d at 241; Smith, 747 F.2d at 375; Campbell, 592 F. Supp. at 1562; see also Goins, 598 F. Supp. at 1154 (dictum); DelCostello v. Teamsters, 588 F. Supp. 902, 907 (D. Md. 1984).

II.

DelCostello Should Also Be Given Retroactive Effect Under The Chevron Test

Failing to follow the Supreme Court's lead, the majority proceeds under Chevron to find that DelCostello should not be applied retroactively to § 301/DFR claims arising in West Virginia. DelCostello is, therefore, applied prospectively to Zemonick's suit by the majority. Although the Supreme Court has directed that DelCostello be given

retroactive effect, I feel that the same result is also mandated under a Chevron analysis.

A.

Retroactivity Is The General Rule

It is firmly rooted in our judicial system "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974); accord Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981); Thorpe v. Housing Authority, 393 U.S. 268, 281 (1969); Murray, 723 F.2d at 1147. Consistent with this principle, it has been repeatedly recognized "that the retroactive applicability of judicial decisions of federal courts is the rule, not the exception." Simpson v.

Director, Office of Workers' Compensation Programs, 681 F.2d 81, 84 (1st Cir. 1982), cert. denied, 459 U.S. 1127 (1983). There is, therefore, a strong presumption in favor of retroactivity that cannot be easily overcome. Id.; see also Robinson v. Neal, 409 U.S. 505, 507-08 (1973). Guided by these general principles, I now turn to the question of retroactivity in this case under the Chevron test.

Because of the strong presumption in favor of retroactivity, all three hurdles of the Chevron test must be passed before courts will refuse to give a case retroactive effect. Rogers v. Lockheed-Georgia Co., 720 F.2d 1247, 1249 (11th Cir. 1983) cert. denied, 105 S.Ct. (1984); Holzsager v. Valley Hospital, 646 F.2d 792, 797 (2d Cir. 1981); Harpp v. General Electric Co., 571 F. Supp. 426, 432 (N.D.N.Y. 1983); accord Kremer v.

Chemical Construction Corp., 623 F.2d 786, 789-90 (2d Cir. 1980), aff'd, 456 U.S. 461 (1982).[6/] As a consequence, the party opposing retroactivity bears the burden of demonstrating that the decision should be

6. Although not expressly holding that prospectivity requires that all three Chevron factors be satisfied, numerous courts have implicitly indicated that the satisfaction of each Chevron factor is a prerequisite to prospective application in any case. See e.g., Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (All three Chevron factors "mitigate against the retroactive application of our holding today."); United States v. Johnson, 457 U.S. 537, 550 n.12 (1982) (factors two and three considered only if the first is satisfied); Jackson v. City of Bloomfield, 731 F.2d 653, 654-55 (10th Cir. 1984) (first Chevron factor is threshold test for nonretroactivity); Railroad yardmasters v. Harris, 721 F.2d 1332, 1344 n.32 (D.C. Cir. 1983) (all three Chevron factors supported prospectivity); In re Locarno 23 Bankr. 622, 632 (Bankr. D. Md. 1982) (prospective application required because all three Chevron factors were satisfied). The requirement that prospective effect will be given a case only if all three Chevron factors are satisfied is also consistent with the strong presumption in favor of retroactivity.

applied prospectively. Cash v. Califano, 621 F.2d 626, 629 (4th Cir. 1980). Despite Zemonick's substantial burden, the majority has concluded that all three Chevron factors favor giving DelCostello only prospective effect in this case. I disagree.

B.

Application of the Three Part Chevron Test

To satisfy the first part of the Chevron test, "a new principle of law [must be established] either by overruling clear past precedent... or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron, 404 U.S. at 106. The majority argues that because of our earlier decisions[7/] in which we expressly held that

7. Kennedy v. Wheeling-Pittsburgh Steel Corp., 81 L.R.R.M. 2349 (4th Cir. 1972); Howard v. Aluminum Workers International Union, 589 F.2d 771 (4th Cir. 1978).

(1) the same statute of limitations should apply to § 301 and DFR suits and that (2) the governing statute of limitations for such suits should be the state's statute for actions on oral contracts, DelCostello overruled clear precedent in this circuit. A close reading of the opinions filed in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981),[8/] however, reveals that DelCostello

8. There are at least three clear indications in Mitchell that a change in the applicable statute of limitations for sec. 301/DFR suits was not far away. Graves v. Smith Transfer Corp., 736 F.2d 819, 821 (1st Cir. 1984); see also Local Union 1397 v. United Steelworkers, 748 F.2d 180, 184 (DelCostello neither established a new principle of law nor decided an issue which could not have been foreshadowed); Landahl v. PPG Indus., 746 F.2d at 1312, 1315 (7th Cir. 1984) ("the result in DelCostello was foreshadowed by Mitchell"); Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d 627, 630 (8th Cir. 1983) ("At the very least, the Mitchell case should have put [plaintiff] on notice that a shorter time limitation might be imposed."); Estades v. Harry M. Stevens, Inc., 593 F. Supp. 778, 782 (D. P.R. 1984) (continued)

did not erupt "from the Supreme Court firmament like a bolt out of the blue." Graves, 736 F.2d at 821. Mitchell was handed

("Mitchell adumbrated the imposition of a six months limitation period in [sec 301/DFR] suits."). The first indication occurred in footnote two of the Court's opinion discussing the amicus argument that the six-month limitations period of section 10(b) should be applied. The Court explained: "Our grant of certiorari was to consider which state limitations period should be borrowed, not whether such borrowing was appropriate." Mitchell, 451 U.S. at 60 n.2 (emphasis in original). The second portent of DelCostello was Justice Blackmun's remark that "[a]lthough I find much that is persuasive in Justice Stewart's analysis, resolution of the sec. 10(b) question properly should await the development of a full adversarial record." Id. at 65 (Blackmun, J., concurring). Finally, the most obvious foreshadowing of DelCostello was Justice Stewart's well reasoned and strongly worded concurring opinion imploring the Court to adopt the six-month limitations period of section 10(b) of the National Labor Relations Act. Id. at 65-71 (Stewart, J., concurring). I agree with the Seventh Circuit that "these three statements in Mitchell clearly suggest that the limitations period of section 10(b) of the Act would be adopted." Landahl, 746 F.2d at 1315.

down after our now apparently misguided decisions in Kennedy and Howard but prior to the time Zemonick filed his suit. Although these decisions were controlling in West Virginia until DelCostello, "a local lawyer dealing with federal claims cannot simply ignore the significance of recent developments in the federal courts that would clearly warn him not to place undue reliance on a particular state case" or federal case applying state law. Landahl, 746 F.2d at 1315. Indeed, "the principle of adopting federal, rather than state, limitations periods in the area of federal labor law has been openly discussed in the courts, and even adopted by some courts prior to DelCostello". Local Union 1397, 748 F.2d at 184 (citing Hall v. Printing and Graphic Arts Union, 696 F.2d 494 (7th Cir. 1982); Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982))

(emphasis added).

Since Mitchell portended an intended change in the law, "the first [Chevron] factor weighs only slightly against retroactivity," Graves, 736 F.2d at 821. Clearly, the uncertain wake left behind by Mitchell reveals that "the six-month statute of limitations was not an abrupt and fundamental shift in a doctrine on which the plaintiff relied because the prior law was erratic and inconsistent." Murray, 723 F.2d at 1148; accord Graves, 736 F.2d at 821; Lincoln, 723 F.2d at 630 ("DelCostello was not a clear break from prior law and notice of a shorter period being applicable was given in Mitchell."); Perez v. Dana Corp., 718 F.2d 581, 587 (3d Cir. 1983) (federal case law was "confused and divided" prior to DelCostello).

Despite these decisions, the majority declares that DelCostello "overruled direct precedent in this court upon which [Zemonick] ... justifiably relied." But where the decision sought to be retroactively applied decided an issue of first impression, the inquiry under the first Chevron factor is only whether the resolution of that issue "was not clearly foreshadowed." Chevron, 404 U.S. at 106. Here, there can be little question that DelCostello decided an issue of first impression that was clearly foreshadowed by Mitchell. Since the Mitchell court specifically declined to address whether section 10(b)'s six-month limitations period should be applied to § 301/DFR, 451 U.S. at 60 n.2; id. at 65 (Blackmun, J., concurring), when that question was finally presented in DelCostello -- it represented an issue of first impression. Additionally, an

examination of Mitchell reveals that the resolution of the question decided in DelCostello was clearly foreshadowed. As noted previously, the Supreme Court gave three separate indications in Mitchell that resolution of the section 10(b) question was just down the road. See supra note 8. No less telling, the Supreme Court, by overruling Hoosier Cardinal in Mitchell, revealed that its view regarding the appropriate statute of limitations for § 301/DFR suits was in no way immutable.

If the majority is correct in asserting that the opinions in Mitchell were not "a clear foreshadowing of the decision in DelCostello," I cannot conceive of a case where a significant and distinct departure from prior law would ever be considered "clearly foreshadowed" by prior decisions.

Under the majority's view, a finding that DelCostello was clearly foreshadowed would have required an express qualification by the Supreme Court in its Mitchell decision informing everyone that it planned to adopt section 10(b)'s six-month limitations period for § 301/DFR claims. But by so clearly revealing its plans for a future decision, the Supreme Court would be rendering an advisory opinion which the Constitution absolutely prohibits. See Muskrat v. United States, 219 U.S. 346, 361 (1911). Therefore, I cannot conclude that in this case satisfaction of the first Chevron factor required more explicit foreshadowing than that provided in Mitchell. Although Mitchell did not hold that § 301/DFR suits would be governed by section 10(b)'s six month limitations period, it plainly alerted those concerned that upon a full adversarial record

the Supreme Court was prepared to address th section 10(b) issue and quite possibly adopt that section's limitations period for § 301/DFR suits. In short, "DelCostello represented a clarification of the law, not 'clean break' with past precedent." Landahl, 746 F.2d at 1315.

Given the overriding weight of precedent holding that DelCostello was not a clear break from prior law[9/] and because Mitchell

9. In Murray, we held that DelCostello was not a clear and abrupt change in the applicable statute of limitations for sec. 301/DFR claims. Admittedly, the applicable state statute of limitations in Murray was Maryland's 30-day statute for actions to vacate an arbitration award, whereas in this case the appropriate state statute of limitations is West Virginia's five-year statute for actions upon oral contracts. Under the first Chevron factor, however, we must look to Supreme Court precedent first and foremost and not merely at our own to determine whether (1) DelCostello represents a clear break from prior law and whether (2) the issue decided in DelCostello was one of "first impression whose resolution was not (continued)

forewarned plaintiffs that the section 10(b) issue would be addressed in a later case, I am persuaded that Zemonick has not satisfied the first part of the Chevron test.

Under the second Chevron factor the majority cryptically concludes that "a finding of nonretroactivity in this case would not be disruptive of any great design of the laws of the United States." There is, however, no support in the case law or in DelCostello itself for the majority's finding that giving DelCostello prospective effect will neither retard its operation nor jettison the carefully balanced policy behind it. The federal courts have uniformly concluded because of nonretroactive

clearly foreshadowed." Chevron, 404 U.S. at 106. Because the Supreme Court precedent did indeed foreshadow DelCostello, I believe our holding in Murray regarding the first Chevron factor should also be applied to this case.

application of DelCostello is manifestly inconsistent with the purpose of the six-month limitations period, the second Chevron factor does not favor prospective application of DelCostello. Local Union 1397, 748 F.2d at 184-85 ("the importance of uniformity in limitations periods" in labor law which "was a major consideration in the DelCostello opinion itself" favors retroactivity); Landahl, 746 F.2d at 1315 ("giving retroactive effect to the DelCostello rule would further its purpose" even though a longer state statute of limitations would otherwise apply); Graves, 736 F.2d at 821-22 ("[G]iving retroactive effect to DelCostello will further the purpose of the rule... [even where] a longer state statute of limitations applie[s]."); Murray, 723 F.2d at 1148 ("[T]he purpose of the DelCostello rule

require[s] retroactive application."[10/]); Lincoln, 723 F.2d at 630 ("retroactive application of DelCostello would further the policy of prompt settlement"); Rogers 720 F.2d at 1250 (Prospective application of DelCostello "would retard rather than further the federal interests in prompt resolution of labor disputes, finality, and consistency embodied in DelCostello."); Edwards v. Sea-Land Service, Inc., 720 F.2d 857, 862 (5th Cir. 1983) (second criterion of Chevron favors application of DelCostello

10. I also believe that we are bound by our previous holding in Murray that the second Chevron factor favors retroactivity. This factor must be analyzed independently from the first Chevron factor and from the equities of each case involved under the third Chevron factor. Furthermore, whether the first and third Chevron factors favor retroactive application of DelCostello may vary from case to case. However, the second Chevron factor cannot vary -- it either favors retroactive application of DelCostello in every case or not at all.

retroactivity); Perez, 718 F.2d at 588 ("second Chevron factor counsels in favor of retroactivity"). Although the Ninth Circuit is the lone federal court of appeals to give DelCostello only prospective effect, even that court has held that "[t]he second Chevron Oil factor does favor retroactivity" because application of a longer state statute of limitations "detracts from the principle of finality" which is a substantial purpose of DelCostello. Barina v. Gulf Trading & Transportation Co., 726 F.2d 560, 564 (9th Cir. 1984)[11/]. Hence, I can find no

11. More recently, the ninth Circuit has declared that in deciding DelCostello, "the Supreme Court wished a uniform statute of limitations to apply" in order to prevent "[t]he waste of time and resources" that had previously occurred when plaintiffs pursued their § 301/DFR claims "under an almost infinite variety of local limitations statutes." Glover v. United Grocers, Inc., 746 F.2d 1380, 1382 (9th Cir. 1984), petition (continued)

authority among the federal courts of appeals supporting the majority's dubious finding that the second Chevron factor favors prospective application of DelCostello.

In addition, an independent examination of DelCostello reveals that a failure to apply the six-month limitations period to this case would be contrary to the federal interests embodied in DelCostello and would significantly hinder the operation of the DelCostello limitations period. The Supreme Court in DelCostello stressed that "the need uniformity" was an important reason for

for cert. filed, 53 U.S.L.W. 3600 (U.S. Feb. 5, 1985) (No. 84-1257). Consequently, the court went on to conclude that "[n]ot to apply DelCostello [retroactively in the case before it] would be to thwart its clear purpose in making uniform the statute of limitations applied to employers and unions when the claim is at once for breach of duty of fair representation and for breach of contract." Id. at 1383.

ending the previous practice of borrowing diverse state statutes of limitations. 462 U.S. at 171 (quoting Mitchell, 451 U.S. at 70 (Stewart, J., concurring)). Equally significant, "the Court reaffirmed that federal labor law favored 'the relatively rapid resolution of labor disputes,' and rejected the adoption of long limitations period which would allow grievance and arbitration decisions to be called into question long after the fact." Perez, 718 F.2d at 588 (quoting DelCostello, 462 U.S. at 168); accord Edwards, 720 F.2d at 861. Application of West Virginia's five-year statute of limitations period would be clearly contrary to DelCostello's dual purpose of uniformity and rapid finality.[12/]

12. Despite the collective wisdom of every federal circuit court of appeals, the (continued)

Refusing to overlook these purposes behind the DelCostello six-month limitations period,

majority concludes that the second Chevron factor favors prospective application of DelCostello. They reach this conclusion by finding (1) "[t]he court's specific endeavor in DelCostello ... was to enlarge the short period of limitations authorized by Mitchell;" (2) that prospective application in this case "would not... significantly retard[]" the policies underlying DelCostello; and (3) that "[t]here are only a few states which have no statutes limiting commencement of actions to vacate arbitration awards." These assertions are only partially true.

First, the Supreme Court in DelCostello's companion case purposely shortened the statute of limitations that had been applied to actions against unions by observing that

> [the] application of a longer malpractice statute as against unions would preclude the relatively rapid final resolution of labor disputes favored by federal law.... In No. 81-2408, for example, the holding of the Court of Appeals would permit a suit as long as three years after termination of the grievance proceeding; many states provide for periods even longer.

DelCostello, 462 U.S. at 168 (footnote omitted). Second, prospective application of DelCostello here would give plaintiffs in West Virginia who filed suit before the (continued)

I conclude that the second Chevron factor also favors retroactivity.

Analyzing the equities in this case

decision in DelCostello was handed down a limitations period that is ten times longer than the six-month period now in effect. Equally noteworthy, the majority's holding today carves an undesirable exception to the DelCostello rule for cases in this circuit arising in West Virginia. These observations clearly demonstrate that prospective application of DelCostello is totally inconsistent with the twin aims of DelCostello: uniformity and rapid finality i labor dispute resolution. Finally, while onl a few states do not have statutes limiting the time within which an action to vacate an arbitration award may be brought, every stat has a limitations period for malpractice actions (that applied to suits against union before DelCostello ended the practice of borrowing the most appropriate state statute of limitations for § 301/DFR claims) far in excess of DelCostello's six-month period. As the Supreme Court observed in DelCostello

> One state's limitations period for legal malpractice is 10 years. Other states allow six years (10 states); five years (4 states); four years (5 states); three years (10 states and the District of Columbia); two years (10 states); and on year (4 states).

Id. at n.18.

under the third Chevron factor, the majority asserts that DelCostello should not be retroactively applied to dismiss this case. According to the majority, dismissal here for untimeliness "shouts of inequity" because Zemonick has "expended considerable time and effort in the development of [his] case on the merits."

I am unable to agree with these assertions by the majority. Retroactive application of DelCostello may be ungenerous, but it is not for this reason a result that we can escape under Chevron. First, Zemonick delayed filing his suit for thirteen months after he was discharged and his cause of action arose. Such a delay is more than twice the time the Supreme Court established for filing § 301/DFR claims in DelCostello. Nor has Zemonick offered any sympathetic or

justifiable reason for his delay. Because this area of federal law was in considerable flux at the time his cause of action arose, caution and diligence demanded that Zemonick exhibit greater promptness in filing suit than he did. As a result, I cannot agree that retroactive application of DelCostello in this case "shouts of inequity." Second, I attach little significance to the majority's observation that Zemonick "expended considerable time and money" in preparing his case prior to its dismissal by the district court. Except for rare cases in which no pretrial discovery is conducted, nearly every plaintiff will have "expended considerable time and money" during the trial preparation stage. But were, as here, the plaintiff "has not been deprived of a judgment obtained before DelCostello came down," there is little inequity in applying that decision

retroactively.[13] Graves, 736 F.2d at 822; accord, Estades, 593 F. Supp. at 782.

Admittedly, the majority correctly notes that our decisions in Murray and Sine may be distinguished from this case by considering the equities involved under the third Chevron factor. In Murray, the plaintiff had notice that Maryland's exceedingly short thirty-day statute of limitations for suits to vacate an

13. The Eleventh Circuit has even concluded that the equities mandate retroactivity: "Prospective application of DelCostello would cause inequitable results. Numerous state statutes of limitations would apply to similar causes of action. Prospective application would extend the inconsistent results that DelCostello sought to remedy." Rogers, 720 F.2d at 1250. Under the majority's view, a plaintiff in Maryland bringing a sec. 301/DFR claim seven months after his cause of action arose but before DelCostello came down would find his claim time barred. A similarly situated plaintiff in West Virginia, however, could bring the same claim up to five years after his cause of action arose without fear of having his claim time barred. Such a result is hardly equitable.

arbitration award applied. 723 F.2d at 1147. Thus, retroactive application of DelCostello in Murray extended the time within which the plaintiff could file even though the delay in filing of over two years still required dismissal. Id. at 1148. Similarly, the retroactive application of DelCostello in Sine had the effect of reinstating a claim that would otherwise have been time barred under a shorter state statute of limitations. 730 F.2d at 966. Nevertheless, the Supreme Court and many of our sister circuits have retroactively imposed DelCostello to time bar a claim that would have been timely under the previously governing state statute of limitations. DelCostello 462 U.S. at 172 (suit filed ten months after cause arosed dismissed under DelCostello rule even though state statute of limitations was three

years); Flores v. Levy Co., 118 L.R.R.M. 3129, 3130-31 (7th Cir. 1985) (DelCostello applied retroactively to dismiss suit brought three years after cause of action arose notwithstanding Illinois' ten year statute of limitations period for written contracts); Landahl, 746 F.2d at 1316 (7th Cir.) (DelCostello applied retroactively to dismiss case filed fifteen months after cause of action arose despite Wisconsin's applicable six-year limitations period); Linder v. Berge, 567 F. Supp. 913, 915-16 (D.R.I. 1983); aff'd, 739 F.2d 686, 690 n.3 (1st Cir. 1984) (DelCostello applied retroactively despite Rhode Island's previously applicable three-year and six-year statutes of limitations for § 301/DFR suits); Graves, 736 F.2d at 820-21 (1st Cir.) (DelCostello applied retroactively to dismiss case filed eight months after cause arose

notwithstanding New Hampshire's one-year limitations period); Rogers, 720 F.2d at 1250 (11th Cir.) (rejecting plaintiff's request that "state statutes of limitations with periods much longer than the six-months adopted in DelCostello be applied); Edwards, 720 F.2d at 859 (5th Cir.) (DelCostello applied retroactively to dismiss claims despite previous applicability of Texas' two and four-year statutes of limitations); Estades, 593 F. Supp. at 782 (suit filed two years and two months after cause of action arose dismissed by retroactive application of DelCostello even though suit would have been timely under Puerto Rico's applicable fifteen-year limitations period). Contra Barina, 726 F.2d at 562 (9th Cir.) (DelCostello applied prospectively to save claim filed less than a year after the cause

arose because it was timely under a four-year state statute of limitations).

Further, the Sixth, Fifth, and Second Circuits have held that DelCostello must be applied retroactively to all cases regardless of the peculiar equities involved in each. Smith, 747 F.2d at 375 (6th Cir.); Gray v. Amalgamated Meat Cutters Local 540, 736 F.2d 1055 (5th Cir. 1984); Welyczko, 733 F.2d at 241 (2d Cir.). Under the illuminating light of these decisions, it is clear that there is no inherent inequity in retroactively imposing DelCostello's statute of limitations even where, like here, it reduces the time available under the previously governing period. Fairness does not require that DelCostello be given only asymmetrical retroactive effect. With respect to statutes of limitations, equity has two sides. If it was fair to the defendant in Murray to

reinstate a claim that was time barred under the state statute by applying DelCostello retroactively, it is equally fair to the plaintiff in this case to dismiss his suit by giving DelCostello retroactive effect. Under the majority's argument, the defendant in Murray -- at least until DelCostello -- reasonably expected to be sued, if at all, within thirty-days after a § 301/DFR cause of action arose against it. Applying DelCostello retroactively in this case would, therefore, be no more unfair to Zemonick than it was to the defendant in Murray. The third Chevron factor requires courts to examine what the equitable consequences of retroactive application are to both parties to an action, not just the plaintiff. 404 U.S. at 107. Consequently, the equities in this case do not demand disregard of the clear weight of

persuasive precedent holding that the third Chevron factor counsels in favor of applying DelCostello retroactively.

From the foregoing, it appears that none of the Chevron factors are susceptible of a determination that favors prospectivity in this case. Chevron plainly commands retroactive application of DelCostello.[14/]

III.

The Extraordinary Weight of Authority Favors Retroactivity

My final reason for arguing that DelCostello should be applied retroactively to this case is the tremendous weight of precedent which I do not believe the majority's reasoning has overcome. Except for

14. Even if we assume that the third Chevron factor favors nonretroactivity in this case, retroactive application of DelCostello would still be necessary because prospective effect cannot be given a decision unless all three Chevron factors are satisfied. See Holzsager, 646 F.2d at 797; Rogers, 720 F.2d at 1249.

the Ninth Circuit, every federal court of appeals has held that DelCostello should be applied retroactively.[15] Smith, 747 F.2d at 375 (6th Cir.) (en banc); Barnett v. United Air Lines, Inc., 738 F.2d 358, 362 (10th Cir.), cert. denied, 105 S. Ct. 594 (1984); Graves, 736 F.2d at 822 (1st Cir.); Gray, 736 F.2d at 1055 (5th Cir.); Welyczko, 733 F.2d

15. Nearly all of the reported district court opinions have also applied DelCostello retroactively. Mosely v. Southern Pac. Transp. Co., 594 F. Supp. 1039, 1050 (E.D. La. 1984); Estades, 593 F. Supp. at 782; Campbell, 592 F. Supp. at 1562; Fisher v. CPC Int'l Inc., 591 F. Supp. 228, 231 (W.D. Mo. 1984); Bey v. Williams, 590 F. Supp. 1150, 1153 (W.D. Pa. 1984); Heffner v. General Comm. of Adjustment, 587 F. Supp. 387, 389 (D. Ind. 1984); Oliver v. Local No. 1261 United Transp. Union, 587 F. Supp. 316 n.1 (N.D. Ga. 1984); Thibault v. Stop & Shop Companies, 585 F. Supp. 1359, 1361-62 (D. Conn. 1984); Vecchiore v. United Tel. Co., 584 F. Supp. 1111, 1116 (N.D. Ohio 1984); Johnson v. Joseph Schlitz Brewing Co., 581 F. Supp. 338, 344 n.1 (M.D.N.C. 1984). Contra Sole v. Thorofare Markets, Inc., 571 F. Supp. 1233, 1236 (N.D. W.Va. 1983).

at 241 (2d Cir.); Murray, 723 F.2d at 1148 (4th Cir.); Lincoln, 723 F.2d at 630 (8th Cir.); Rogers, 720 F.2d at 1250 (11th Cir.); Perez, 718 F.2d at 588 (3d Cir.); Storck v. Teamsters, 712 F.2d 1194, 1196 (7th Cir. 1983). Contra Barina, 726 F.2d at 564 (9th Cir.). Given the sound reasoning in these decisions, I find no reason, unlike the majority, to join the lonely position taken by the Ninth Circuit and thereby depart from the almost uniform view that DelCostello should be applied retroactively.

For all these reasons, I cannot lend my approbation to the majority's decision which is -- in my view -- neither sound nor permitted by the case law. Accordingly, I dissent from the majority's prospective application of DelCostello in this case and would affirm the judgment of the district court.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL ZEMONICK, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 81-0036-C

CONSOLIDATION COAL CO., et al.,
Defendants.

## MEMORANDUM ORDER

This civil action raises important labor law question and arises from the discharge of eleven employees of Consolidation Coal Company, the discharged employees being members of a Local of District 31, United Mine Workers of America. Plaintiff Zemonick was discharged by Defendant Consolidation on February 18, 1980, and the other Plaintiffs were all discharged on or about March 5,

1980. Each Plaintiff grieved his discharge and each took his discharge to arbitration and was represented in those proceedings by the Union. The proceedings all resulted in arbitration awards denying the grievances and sustaining the discharges. The awards were entered on varying dates between February 28, 1980, and May 5, 1980.

Plaintiffs contend that the denial of their grievance proceedings were underpinned by two decisions of the Arbitration Review Board (the appeals tribunal established by the collective bargaining agreement between the Union and Consolidated and other entities in the Bituminous Coal Operators Association). It is urged that Decision 108 (rendered October 10, 1977) and Decision 78-15 (rendered September 10, 1979) suffered several infirmities.

This action was filed in June, 1981, and seeks reinstatement of Plaintiffs in their former jobs with backpay and appropriate seniority, or remand to an arbitrator for another hearing; injunctive relief; monetary damages, and costs and attorney's fees. The complaint is broad and far-reaching. The grounds for relief include the following:

1. The discharge of Plaintiff Zemonick violated substantial public policy as reflected in federal and state statures. (Complaint, par. 37.)

2. The arbitrators decisions affirming the discharges are void since they are based on Arbitration Review Board (ARB) decisions 108 and 78-15; the procedures used were inadequate and violated due process, and the Union breached its duty of fair representation. (Complaint, par. 38.)

3. ARB decisions 108 and 78-15 are

vague, overbroad, and arbitrary; place unreasonable burdens of proof on discharged employees, and violate public policy. They are also in conflict with the express intent of rank and file in contract ratification votes and the Union violated a duty of fair representation by bargaining away rights. (Complaint, par. 39-41.)

4. The arbitration decision in Plaintiff Zemonick's case is internally inconsistent and violates the collective bargaining agreement. (Complaint, par. 42.)

5. The arbitration decisions in the other Plaintiffs' cases are void because they violate the collective bargaining agreement. (Complaint, par. 43.)

6. The procedures at arbitration in all the cases violated due process since the level of representation was grossly

imbalanced and exculpatory evidence was excluded. (Complaint, par. 44.)

7. The Union violated its duty of fair representation at arbitration proceedings in all the cases. (Complaint, par. 45-46.)

8. Consolidated conspired with other coal mining employers in the region to deny Plaintiffs employment in the coal mining industry. (Complaint, par. 47.)

Plaintiffs have moved for a partial summary judgment vacating Plaintiffs' arbitration decision; declaring void and in violation of law and public policy the standards upon which those decisions rested (presumably, ARB decisions 108 and 78-15), and declaring legally inadequate the procedures by which those decisions were reached. In response, Consolidation filed a cross-motion for partial summary judgment as to all issues in this action relating to

Plaintiffs' terminations. The Union filed a response indicating it has nothing to offer in regard to Plaintiffs' motion, and reserved the right to present argument at a later time. Finally, following the decision of the United States supreme Court in DelCostello v. Teamsters, ___ U.S. ___, 76 L.Ed.2d 476 (1983), Consolidated moved for partial summary judgment as to all causes asserted by Plaintiffs alleging Consolidated breached a provision of the collective bargaining agreement and alleging that the Union had breached its duty of fair representation. Consolidated urges that these claims are barred by the applicable statute of limitations. All three motions before the Court have been fully briefed by the Plaintiffs and Defendant Consolidated.

DelCostello appears to have particular

application to the instant civil action. One of the two cases before the court in DelCostello, like the one at bar, concerned an employee discharge, grievance and arbitration, and a resulting court action charging the employer terminated the employee in violation of the collective bargaining agreement and the union failed to adequately represent the employee at arbitration. The suit against the employer rests on 29 U.S.C. § 185, since the employee alleges a breach of the bargaining agreement, and the suit against the union is implied under the National Labor Relations Act. DelCostello, ___ U.S. ___, 76 L.Ed.2d at 489. See Vaca v. Sipes, 386 U.S. 171 (1967).

The extensive and excellent briefing by the parties on whether DelCostello should be applied retroactively to the instant case has been mooted by the recent decision of the

Circuit Court of Appeals in Murray v. Branch Motor Express, ___ F.2d ___, No. 82-1202 (4th Cir. December 20, 1983). Murray announces that the Fourth Circuit joins several other circuit courts in applying DelCostello retroactively.

It seems abundantly clear that Defendants should be granted some relief on their motion for partial summary judgment based on a statute of limitations. DelCostello directs that § 301 (29 U.S.C. § 185) fair representation cases are subject to the six-month statute of limitations contained in 29 U.S.C. § 160. This action was filed over a year after all of the arbitration decisions affirming the dismissals of these Plaintiffs were entered. Plaintiffs have not alleged that the statute of limitations was tolled in any fashion.

In its motion raising the statute of limitations defense, Consolidated appears to limit the relief requested to issues surrounding the arbitration proceedings involving these eleven plaintiffs. (Consolidated sought relief as to par. 38D, 42-46 of the Complaint. The hybrid type lawsuit described by DelCostello would probably also include at a minimum par. 38B.) As the Court views the complaint, this would leave issues involving the underlying decisions of the ARB, the public policy-based issue on the retaliatory nature of Plaintiff Zemonick's discharge, and the claim of conspiracy to deny Plaintiff's employment.

The Court has no problem with viewing the conspiracy allegations as beyond the scope of the statute of limitations motion. Neither is this issue included in the cross-motions for summary judgment. By virtue of

the cross-motions for summary judgment, however, the Court feels comfortable with addressing whether the remaining issues involving the Plaintiff's discharges fall within the purview of the statute of limitations.

All lawsuits challenging discharges or arbitration proceedings are not subject to the statute of limitations announced by DelCostello. United Parcel Service v. Mitchell, 451 U.S. 56 (1981). International Union v. Ingram Mfg., 715 F.2d 886 (5th Cir. 1983). A fair reading of the complaint before the Court, however, reveals (1) a common theme of employer breach of the collective bargaining agreement and (2) Union breach of the duty of fair representation. Even those parts of the complaint challenging ARB decisions 108 and 78-15 separate and apart from their role in arbitration directly

affecting these Plaintiffs contain the elements of a DelCostello 29 U.S.C. § 185 fair representation hybrid. See Complaint, par. 40, 41.

The Court recognizes the main relief sought is reinstatement with back pay and seniority. This cannot be achieved where the proceedings, concerning Plaintiffs' discharges, are beyond the jurisdiction of the Court because of the applicable statute of limitations.

It is the opinion of the Court that this civil action (with the exception of the conspiracy issue) must be viewed as a DelCostello hybrid. Certainly there are some "accessory" claims which conjure illusions of other species of litigation.[1] The common

1. "Accessory" claims appear to be common to the DelCostello hybrid. Indeed, in his (continued)

thread throughout the complaint, however, is (1) breach of the contract by Consolidated and (2) breach of the fair representation duty by the Union. In light of the relief requested, excision of the "accessory" allegations would leave Plaintiffs without a coherent cause of action. Accordingly, all of Plaintiffs' grounds for relief, save those raised in par. 47 of the complaint (the conspiracy issue) will be dismissed on the basis of the applicable statute of limitations.

These defense motions have been prosecuted by Consolidated. The Union has not

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complaint before the District Court, Phillip DelCostello charged a conspiracy between his employer and the union to remove him from his job. DelCostello v. Teamsters, 510 F. Supp. 716, 720 (D. Md. 1981). An age discrimination claim was injected by plaintiffs in Edwards v. Sea-Land Service, 678 F.2d 1276 (5th Cir. 1982), vacated (on the basis of DelCostello), ___ U.S. ___, 77 L.Ed.2d 1360 (1983).

joined them or filed separate motions. Because of the nature of the DelCostello hybrid, however, the cause against the Union also must be dismissed.

It is the opinion of the Court that the remaining claim--an allegation that Consolidated conspired with other coal producing firms to deny Plaintiffs employment in the coal mining industry--is a State common law issue. It must be viewed as a pendent claim, and the Court believes it must be reviewed at this time since the federal claims to which it is tied are being dismissed prior to trial.

"It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." U.M.W.

of A. v. Gibbs, 383 U.S. 715, 726 (1966)[2]. The Gibbs decision strongly suggests pendent state claims should be dismissed if the federal claims are dismissed before trial, or if state issues predominate. Both these factors are present in the current posture of the instant case. The Court recognizes the potential for issues based in federal law arising in the development and trial of the conspiracy claim as drawn in the complaint.[3] Nonetheless, it is believed State issues predominate.

Since the federal claims are being dismissed on the basis of the applicable

2. The state claim in Gibbs, like that in the instant case, charged a conspiracy to deny employment and freedom to contract.

3. Plaintiffs' claim that the conspiracy violated rights under 42 U.S.C. sec. 1985(3) may have been affected by the decision in United Brotherhood of Carpenters v. Scott, ___ U.S. ___, 77 L.Ed.2d 1049 (1983).

statute of limitations, the Court is convinced that the State conspiracy claim should be dismissed without prejudice. Cf. Metz v. Tootsie Roll Industries, 715 F.2d 299, 307 (7th Cir. 1983) (appeal pending).

The foregoing constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. Upon the reasoning the conclusions herein, it is

ORDERED that Defendant Consolidated's motions for partial summary judgment with regard to all issues relating to Plaintiffs' discharges are GRANTED, and that Plaintiffs' motion for partial summary judgment is DENIED. It is further

ORDERED that the Court declines to exercise pendent jurisdiction over the remaining conspiracy claim, and the same is

DISMISSED without prejudice. It is further

ORDERED that this civil action be, and the same is hereby, DISMISSED and retired from the docket of the Court.

DATED: February 29th, 1984.

UNITED STATES DISTRICT JUDGE

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL ZEMONICK, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 81-0036-C

CONSOLIDATION COAL CO., et al.,
Defendants.

### JUDGMENT ORDER

For the reasons stated in the Court's Memorandum Order Dated February 29, 1984, it is ADJUDGED and ORDERED that:

1. Defendant Consolidated's motions for partial summary judgment with regard to all issues relating to Plaintiffs' discharges are GRANTED, and that Plaintiffs' motion for partial summary judgment is DENIED.

2. The Court declines to exercise pendent jurisdiction over the remaining conspiracy claim, and the same is DISMISSED

without prejudice.

3. This civil action is DISMISSED and retired from the docket.

APPROVED: February 29, 1984

UNITED STATES DISTRICT JUDGE

Dated at Elkins, West Virginia, this 2nd day of March, 1984.

Clerk of Court